No.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding below.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. Berkshire Hathaway Inc. owns 10% or more of National Indemnity Company.

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PETITION FOR A WRIT OF CERTIORARI

BNSF Railway Company (BNSF) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 865 F.3d 1106 and included in the Appendix ("App.") at 1a–24a. The Eighth Circuit's order denying rehearing or rehearing en banc (App. 31a-32a) is not reported. The post-trial order of the district court is unpublished and included in the Appendix at 25a–30a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Eighth Circuit entered its judgment on August 3, 2017 and denied BNSF's timely petition for rehearing or rehearing en banc on October 26, 2017.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Railroad Retirement Tax Act, the Railroad Retirement Act, and the implementing regulations are set forth in the appendix to this petition. (App. 33a-48a.)

INTRODUCTION

After plaintiff obtained a jury verdict for lost wages in connection with a workplace injury, BNSF moved to amend the judgment. BNSF asked the district court to reduce the judgment by an amount

to cover the payroll taxes that plaintiff owed to the Internal Revenue Service under the Railroad Retirement Tax Act (RRTA). The district court refused and the court of appeals affirmed, holding that the damages that plaintiff received for time lost from work do not constitute taxable compensation under the RRTA. (App. 24a.) Thus, this case presents the question whether a railroad's payments to an employee for time lost are subject to employment taxes under the RRTA.

The decision of the Eighth Circuit in this case conflicts with a prior decision of the Sixth Circuit. *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009). The conflict is further sharpened by decisions of the highest courts of three states within the Eighth Circuit, which are themselves divided on the question presented in this case, with two courts agreeing with the Sixth Circuit and the third court on the side of the Eighth Circuit. *Compare Phillips v. Chicago Central & Pacific R.R.*, 853 N.W.2d 636 (Iowa 2014); *Heckman v. Burlington N. Santa Fe Ry.*, 837 N.W.2d 532 (Neb. 2013), *with Mickey v. BNSF Ry.*, 437 S.W.3d 207 (Mo. banc 2014).

The disagreement turns on the validity of an IRS regulation that interprets taxable "compensation" under the RRTA as including pay for time lost. 26 C.F.R. § 31.3231(e)-1(a) (App. 46a-47a). The Supreme Courts of Iowa and Nebraska reason that it is "unclear" from the RRTA's statutory language and structure "whether Congress intended to include time lost in the definition of [taxable] compensation." *Phillips*, 853 N.W.2d at 649. These courts find that

the IRS's interpretation is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Phillips*, 853 N.W.2d at 649-51; *Heckman*, 532 N.W.2d at 540; *see also Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29-30 (Pa. Sup. Ct. 2016).

In its decision in this case, the Eighth Circuit rejected the IRS's interpretation of the statutory language and held payments for lost time are not taxable under the RRTA. The Eighth Circuit reasoned that the "plain language" of the RRTA, limiting "compensation" to remuneration paid "for services rendered as an employee," requires actual performance of the service. (App. 20a.) The Eighth Circuit held that "the regulations providing to the contrary receive no deference under *Chevron* ...." (App. 24a.) Similarly, the Missouri Supreme Court acknowledged the contrary rulings of the Iowa and Nebraska Supreme Courts relying on *Chevron* but found them "unpersuasive." *Mickey*, 437 S.W.3d at 212-16 & n.10.

This conflict creates an untenable situation. Railroads and their employees face different tax liability depending upon where the lawsuit is filed. For example, an employee injured in Iowa can avoid paying RRTA taxes on lost wages – and thereby take home more money – simply by filing his negligence suit in Iowa federal court rather than Iowa state court. This is a particular problem for BNSF, which has operations and employees in 28 states including Iowa, Nebraska, and Missouri. This Court has long recognized that the Nation's tax laws are to be

interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979).

In view of the conflict in the courts, BNSF seeks definitive guidance from this Court on the validity of the IRS's interpretation that the pay for time lost is subject to employment taxes under the RRTA. Under the RRTA, the railroad employer must withhold its tax share, as well as its employee's tax share, and then pay over both shares to the IRS. 26 U.S.C. §§ 3202(a)-(b). Failure to withhold the taxes is a serious offense under federal law, subjecting the railroad to fines and potential criminal liability. *See* 26 U.S.C. § 6672. BNSF is required under the IRS regulation to pay the RRTA taxes for time lost, and it followed that regulation here. The United States participated as amicus curiae in this case to support its regulation. (App. 2a, 21a, 23a.)

This issue arises in every case in which a rail employee makes a claim for lost wages against his railroad employer. It therefore affects thousands of railroad workers and every freight railroad in the United States. There are over 152,000 Class 1 railroad employees in this country, and over 4000 railroad employee on-the-job incidents each year. With the state and federal courts in sharp disagreement, the time is ripe for this Court to intervene and achieve a uniform interpretation of this federal statute.

STATEMENT

A. Railroad Retirement Statutory Scheme

Railroad employees do not participate in Social Security and are exempt from the Federal Insurance Contributions Act (FICA). *See* 26 U.S.C. § 3121(b)(9). Since the 1930s, the railroad employees have participated in a separate retirement and disability benefit system. The federal legislation to manage this system consists of two "closely related" statutes: the Railroad Retirement Act (RRA), which establishes the benefits, and the Railroad Retirement Tax Act (RRTA), which sets the taxes to fund those benefits. (App. 18a.)

Under these closely related statutes, the benefits and taxes are predicated on the employee's "compensation." *See* 26 U.S.C. § 3201 (employee rate of tax); 26 U.S.C. § 3221 (employer rate of tax); 45 U.S.C. § 231a (eligibility for annuities). The RRTA – which imposes taxes to fund the benefits – defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (App. 33a).

The RRA – which establishes the benefits – defines "compensation" as any form of "monetary remuneration paid to an individual for services rendered as an employee to one or more employers ... including remuneration paid for time lost as an employee ...." 45 U.S.C. § 231(h)(1) (App. 41a). This definition makes clear that pay "for services

rendered" is broad enough to encompass pay for time lost.

B. The Interpretations of Federal Agencies

The IRS administers the RRTA and, since 1956, has defined taxable compensation to include pay for time lost.[1] The IRS regulation provides that the "term compensation is not confined to amounts paid for active services, but includes amount paid for an identifiable period during which the employee is absent from the active service of the employer . . . as well as pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(3)-(4) (App. 46a-47a).[2]

The IRS reaffirmed this interpretation in a 1994 rulemaking. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66187 (Dec. 23, 1994). In that rulemaking, one commenter stated that statutory amendments had eliminated payments for "time lost" from the RRTA's definition of taxable compensation and thus this regulation was

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[1] *Employment Taxes: Applicable on or after January 1, 1955*, 21 Fed. Reg. 1648, 1653-54 (Mar. 15, 1956) (Proposed Rulemaking); *Employment Taxes: Applicable on or after January 1, 1955*, 1956 WL 58917 (Sept. 4, 1956) (final rulemaking); *Republication of Regulations*, 25 Fed. Reg. 13032, 13080 (Dec. 20, 1960).

[2] The IRS's regulations also state that the "term compensation has the same meaning as the term wages in [FICA] ... except as specifically limited by the Railroad Retirement Tax Act ... or regulation." 26 C.F.R. § 31.3231(e)-1(a) (App. 46a).

no longer supported by the statute. *Id.* The IRS explained that the statutory amendments only affected when, not whether, time-lost payments were included in compensation. *See id.* Thus, the IRS maintained that the statutory amendments did not exclude time-lost payments from the definition of "compensation."

The Railroad Retirement Board administers the benefits program under the RRTA. The Board counts payments for time lost toward the employees' creditable service and agrees with the IRS that the definition of taxable compensation under the RRTA should be construed similarly. (App. 18a.) As the Board explained, "[t]he Office has long recognized that in view of the substantial similarity between the definitions of compensation under the RRA and RRTA, it is desirable, absent controlling language to the contrary to treat payments to employees in the same fashion under both statutes."[3] Thus, the Railroad Retirement Board maintains that "[a]s with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act ...."[4]

This interpretation treats benefits and taxes symmetrically. Pay for time lost is counted toward creditable service under the RRA and affects the level of benefits that the employee receives when he

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[3] U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

[4] U.S. Railroad Retirement Board, *Railroad Retirement Service Credits and Pay for Time Lost* at 1, 3 (May 2011).

or she retires. (App. 18a.) And both the employee and employer pay taxes on pay for time lost under the RRTA to fund those benefits. (App. 19a.)

C. The Relevant Facts and Procedural History

The facts are not in dispute. In 2013, plaintiff sued BNSF under the Federal Employers' Liability Act (FELA) to recover damages for work-related injuries. The FELA provides for concurrent jurisdiction in state and federal court. 45 U.S.C. §§ 51, 56. Plaintiff filed this action in Minnesota federal district court. Following a trial, the jury returned a verdict in favor of plaintiff in the amount of $126,212.78. (App. 7a.) The verdict included a line itemization of $30,000 in lost wages. (App. 7a, 26a.) The district court entered the entire amount in judgment against BNSF. (App. 26a.)

BNSF filed a timely motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e). (App. 7a.) BNSF notified the court that it had paid to the IRS a total of $9990 in RRTA taxes, which consisted of the $3765 owed in payroll taxes by plaintiff and the $6234 owed in payroll taxes by BNSF for the lost wage payment. (App. 29a; Dist. Ct. ECF No. 162.) As BNSF explained, plaintiff had received credit towards the amount of his retirement benefits for this time-lost payment. (*Id.*) Consequently, BNSF asked the district court to offset the judgment by $3765 to reflect plaintiff's share of taxes owed under the RRTA as a result of the lost wage award. (App. 29a.)

The district court agreed with BNSF that "FELA judgments for lost pay fall within the definition of 'compensation'" under the RRTA. (App. 29a.) However, the district court observed that personal injury awards are exempt from income taxes under 26 U.S.C. § 104. (App. 30a.) The court believed that this exemption for personal injury judgments should apply to the RRTA's definition of compensation as well. (App. 30a.) Accordingly, the court denied BNSF's motion for an offset.

BNSF appealed, and the United States filed an amicus brief in support. Their briefs explained that the RRTA tax is imposed on "compensation" – a defined term in the RRTA – and that the IRS has interpreted this term to include pay for time lost. The district court was wrong to invoke Section 104, which is an exemption applicable to a different statutory term (gross income) for a different tax (income tax). The IRS has concluded in two Revenue Rulings that Section 104 has no bearing on the RRTA tax treatment for time lost.[5] Finally, the briefs pointed to the decisions from the Iowa Supreme Court and Nebraska Supreme Court, as well as a recent decision of the Pennsylvania intermediate appellate court, as holding that lost wages are taxable compensation under the RRTA.

The Eighth Circuit panel heard oral argument in this case and another RRTA case on the same day.

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[5] *See* Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961); IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985).

The other case raised two questions: (1) whether non-qualified stock options are taxable compensation under the RRTA, and (2) whether lump-sum payments to unionized employees were "for services rendered" by the employee. The Eighth Circuit panel ruled against the IRS on both issues. *Union Pacific R.R. Co. v. United States*, 865 F.3d 1045 (8th Cir. 2017), *pet. for cert filed*, No. 17-1002.[6] The same panel issued its published decision in this case three days later.

D. The Opinion of the Eighth Circuit

The Eighth Circuit affirmed the district court's decision in this case, though on different grounds. (App. 24a.) The court recognized that "damages for lost wages fit well within the definition of 'compensation'" under the IRS regulation, but it rejected this interpretation of the RRTA. (App. 19a-20a.) "[T]he RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (App. 24a.)

The Eighth Circuit reasoned that the RRTA defines "compensation" as remuneration paid "for

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[6] On January 12, 2018, this Court granted certiorari to resolve the split between the Eighth, Seventh, and Fifth Circuits on whether non-qualified stock options are taxable compensation under the RRTA. *See Wisc. Central Ltd. v. United States*, No. 17-530, 2018 WL 386569 (Jan. 12, 2018). On January 18, 2018, the United States filed a petition for certiorari from the Eighth Circuit's opinion in *Union Pacific* and asked this Court to hold the petition in abeyance pending the Court's decision in *Wisconsin Central*.

services rendered as an employee." (App. 20a.) The panel construed "services rendered" to mean "services that that an employee actually renders, not to services that the employee would have rendered but could not." (App. 20a.) The panel acknowledged that this Court has construed, in the FICA context, the concept of payment for services performed to encompass the entire employee-employer relationship. (App. 19a-20a.)[7] However, citing to its recent opinion in *Union Pacific*, the panel found this FICA precedent was not applicable to the RRTA and thus gave it no weight. (App. 20a.) The panel concluded that "damages for lost wages do not fit within the plain meaning of the RRTA" and that the IRS "regulations providing to the contrary receive no deference under *Chevron* ...." (App. 20a, 24a.)

The Eighth Circuit acknowledged that the RRA defines compensation to include pay for time lost. "[B]ecause the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (App. 21a.) The court, however, observed that these statutes contained "linguistic" differences: "That Congress expressly included pay for time lost in the RRA's definition of 'compensation' yet omitted it from the RRTA's definition suggests that Congress did not intend the RRTA to include pay for time lost." (App. 21a.) According to the court, the statutory

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[7] *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014).

history "confirms" that the linguistic differences are "intentional." (App. 21a.) Thus, the Eighth Circuit ruled that the lost-wages award was not subject to payroll taxes under the RRTA. (App. 23a-24a.)

BNSF filed a timely petition for rehearing and rehearing en banc. BNSF explained that the panel's ruling conflicted with decisions of other state and federal courts, which had found the statutory language and history ambiguous. The Eighth Circuit denied rehearing on October 26, 2017.

E. The United States Maintains the Eighth Circuit's Decision Should Not Be Followed

After the Eighth Circuit issued its decision, the turmoil over the scope of the RRTA taxes continued. On November 21, 2017, the United States filed an amicus brief in the Illinois intermediate appellate court in a case raising the same time-lost issues. *See Munoz v. Norfolk S. Ry. Co.*, No. 1-17-1009 (Ill. App.). In its brief, the United States argued the Eighth Circuit's decision in *Loos* is "seriously flawed" and "should not be followed." U.S. Amicus Br. 13, *available at* 2017 WL 6885570.

The United States explained that the court's opinion was contrary to this Court's precedent. According to the United States, the Eighth Circuit's narrow interpretation of what is taxable compensation under the RRTA – and specifically, the phrase "for services rendered" – is "in substantial tension with the Supreme Court's holdings in the analogous Social Security context that back pay and severance pay constitute taxable wages." (*Id.* at 14.) The United States further criticized the Eighth Circuit's simplistic review of the statutory

amendments and refusal to defer to the agency's interpretation of those amendments, contrary to *Chevron*. As the United States explained, "a careful analysis" of those amendments, including the legislative history, "shows that the statute was amended for reasons unrelated to pay for time lost" and that Congress did not intend to exclude time-lost payments from RRTA taxes. (*Id.*)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the federal and state courts are in conflict on the issue of whether awards for lost pay are subject to RRTA taxes. This conflict is sharpest in the Eighth Circuit, where the federal and state supreme courts are themselves divided, with the Eighth Circuit and Missouri Supreme Court on one side and the Supreme Courts of Iowa and Nebraska on the other. As a result of this conflict, the railroad and its employees face conflicting rules on RRTA tax liability depending on the forum. Only this Court can resolve this conflict and ensure that similarly situated taxpayers pay the same amounts.

I. The Eighth Circuit's Opinion Deepens an Existing Conflict Over the Taxation of Lost Wages Under the RRTA

A. The Sixth Circuit Rules That Lost Wages Are Taxable Under the RRTA

The Sixth Circuit was the first appellate court to address the issue of whether pay for time lost is taxable under the RRTA. *See Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009). The court held

that the RRTA imposes payroll taxes on a jury's award of backpay to a railroad employee. *Id.* at 523.

In *Hance*, a former employee obtained a favorable verdict against the railroad for discrimination and obtained an award of damages including for backpay. *Id.* at 515, 517. On appeal, the railroad argued that the damages should be reduced by the employee's share of RRTA taxes because this is not money he would take home and thereby goes beyond what is needed to make the plaintiff whole. *Id.* at 522. The Sixth Circuit agreed. "The Railroad Retirement Tax Act and its accompanying regulations ... require an employer to pay ... taxes on all 'compensation' to employees, including payment for time lost." *Id.* at 523 (internal quotations and citation omitted). The railroad "will be required to report and pay ... taxes on the back pay award ...." *Id.* at 523. Thus, the Sixth Circuit vacated the district court's award and directed the district court to enter an order acknowledging that the railroad must "comply with its obligations to pay" the employer and employee taxes on the backpay award. *Id.*

B. The State Supreme Courts Split on the Issue

Because FELA cases can be brought in either state or federal court, the question of whether pay for time lost constitutes taxable compensation under the RRTA also arose in the state courts. The Missouri Supreme Court split with the Iowa and Nebraska Supreme Courts on whether lost-wages awarded as part of a FELA judgment are subject to RRTA taxes. The United States participated as amicus curiae in all of these appeals.

When faced with the issue in 2013, the Supreme Court of Nebraska recognized that "we apply federal law to determine if the time lost was compensation subject to withholding under the RRTA." *Heckman v. Burlington N. Santa Fe Ry. Co.*, 837 N.W.2d 532, 540 (Neb. 2013). After reviewing the relevant statutes and regulations, the court concluded that the lost-wages award in the FELA judgment is taxable compensation under the RRTA. "Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations as found in federal regulations, we conclude that time lost is compensation that is subject to taxation." *Id.* The court reasoned that the RRA defines compensation to include payments for time lost and that the IRS had interpreted compensation under the RRTA to include "pay for time lost." *Id.* at 539-40 (citing Treas. Reg. § 31.3231(e)-1(a)(4)). "Time lost is equated with lost wages." *Id.* at 540.

One year later, the Supreme Court of Iowa took a more detailed look at the issue and reached the same conclusion. *Phillips v. Chicago Central & Pacific R.R. Co.*, 853 N.W.2d 636, 652 (Iowa. 2014). The court recognized that this "is a question of federal law" and that "this case is properly analyzed under *Chevron*." *Id.* at 648. On *Chevron* step 1, the court started with the statutory language and found that the RRTA "does not explicitly address the tax consequences of remuneration for time lost ...." *Id.* at 640. The court acknowledged that "time lost" used to appear in the RRTA's definition of compensation and that this language was removed in 1975. "This

deletion, however, does not compel an assumption that Congress intended the definition of compensation to exclude time lost in the RRTA." *Id.* at 648.

The Iowa Supreme Court looked to the definition of compensation as defined in the companion statute – the RRA. "The RRA and the RRTA are inextricably interconnected because the latter funds the former," and thus the "RRA is part of the context and statutory scheme which courts look to in analyzing congressional intent." *Id.* at 650. Because the RRA includes time for pay for time lost in its definition of compensation, "[i]t would seem logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost." *Id.* at 649. The court also looked to the legislative history of the statutory amendments to the RRTA. The court found that "the legislative history appears to conclude that amendments, which removed the 'time lost' language from the RRTA, did not intend to remove the phrase from the meaning of compensation, although the legislative history is generally unhelpful in clarifying Congress's intent on this precise issue." *Id.* at 650; *see also id.* at 640 & nn.1-3. After "considering the statutory language, the statutory scheme, and the legislative history of the definition of compensation as used in the RRTA," the Iowa Supreme Court found "congressional intent ambiguous." *Id.* at 650.

The Iowa Supreme Court then turned to step two in *Chevron*'s analysis. 853 N.W.2d at 650. The court noted that the IRS "was aware of the removal of the

phrase 'time lost' from the definition of compensation from the statute and, after analyzing the legislative history, determined that Congress did not intend to 'exclude payments for time lost from compensation.'" *Id.* The court also relied on compatible interpretations of the federal agencies construing the RRTA and RRA. *See id.* at 651. "[W]e conclude that the definition of compensation to include time lost as interpreted by the Treasury Department ... is reasonable, and thus, time lost is properly taxed as compensation under the RRTA." *Id.* at 652.

Two weeks later, the Supreme Court of Missouri split with the Supreme Courts of Iowa and Nebraska. *See Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207 (Mo. banc 2014). The Missouri Supreme Court recognized that "*Phillips* holds that the RRTA's definition of compensation includes lost wages and that lost wages received on account of a FELA personal injury claim are subject to withholding taxes under the RRTA." *Id.* at 212. However, "[t]his Court finds *Phillips* unpersuasive." *Id.* at 213. The court also criticized the *Heckman* decision, saying the Nebraska Supreme Court committed "error" in failing to differentiate between the RRA and RRTA. *Id.* at 215 n.10.

The *Mickey* court insisted that "[t]here are many reasons why the term 'compensation' has a different meaning under the RRTA than it has under the RRA." *Id.* at 213. The *Mickey* court relied heavily upon the exclusion from federal income taxes for personal injury awards, 26 U.S.C. § 104(a)(2). *See id.* Although Section 104's exclusion applies to a

different tax – federal income taxes – the Missouri court reasoned that the same exclusion should apply to RRTA taxes. *Id.*; *see id.* at 210-12.[8]

The *Mickey* court also emphasized that "the RRA is a remedial act that provides benefits to railroad workers" and calculating the benefits to include time-lost payments "advances the RRA's remedial purpose." *Id.* at 215. The court concluded: "No credible reason is given by the parties to this suit or the Iowa Supreme Court's opinion in *Phillips* why this Court should incorporate a definition of compensation from the RRA into the interpretation of the RRTA in order to determine whether withholding taxes are due on personal injury awards." *Id.*

Mickey did not resolve the issue in the courts. In 2016, the Pennsylvania appellate court ruled that an award for lost time due to personal injury is taxable under the RRTA. *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25-30 (Pa. Super. Ct. 2016). In its analysis, the court sided with the Supreme Courts of Iowa and Nebraska and against the Supreme Court

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[8] In a recent amicus brief filed in the Illinois appellate court, the United States has explained the critical flaw in the *Mickey* court's reliance on the personal injury exclusion in Section 104(a)(2): "I.R.C. 104(a)(2) provides an *income* tax exclusion but income tax and RRTA tax are entirely different types of taxes." U.S. Amicus Br. 22, *available at* 2017 WL 6885570. "The scope of what is taxable under the income tax and the RRTA is different ..., and an exclusion from income tax does not dictate an exclusion from RRTA tax ...." *Id.*

of Missouri on this issue. "Although the *Mickey* court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered in *pari materia*." *Id.* at 29. "Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Id.*

The Pennsylvania court also criticized the *Mickey* court's reliance on the FICA's definition of wages. "[W]hat the *Mickey* Court, and the trial court herein, failed to consider, is the difference in the way in which the RRA and the Social Security Act (SSA) treat lost wages awarded in a personal injury suit." *Id.* at 29. The Pennsylvania court explained that the SSA does not calculate benefits based on an employee's pay for lost time due to personal injury and thus "it follows that . . . FICA also does not tax an award for time lost due to personal injury." *Id.* at 30. By contrast, under the RRTA the railroad employee receives an increase in benefits based upon pay for time lost and thus "it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Id.* at 29. Thus, the *Liberatore* decision deepened the conflict in the state courts, which alone would have warranted *certiorari*.

C. The Eighth Circuit's Decision Inserts Another Opposing View in the Midst of This Conflict

One year following *Liberatore*, the Eighth Circuit published its decision in this case, deepening the conflict. The Eighth Circuit acknowledges that "because the RRTA expressly considers pay for time

lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (App. 21a.) However, the court did not reach that outcome. It held "that the RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (App. 24a.)

This holding conflicts with the Sixth Circuit, which held: "The Railroad Retirement Tax Act and its accompanying regulations ... require an employer to pay ... taxes on all 'compensation' to employees, including payment for time lost." *Hance*, 571 F.3d at 523.

It also directly conflicts with the holdings of the Iowa and Nebraska Supreme Courts. *See Phillips*, 853 N.W.2d at 652 ("[W]e conclude that the definition of compensation to include time lost as interpreted by the Treasury Department ... is reasonable, and thus, time lost is properly taxed as compensation under the RRTA."); *Heckman*, 837 N.W.2d at 540 ("Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations as found in federal regulations, we conclude that time lost is compensation that is subject to taxation."). *See also Liberatore*, 140 A.3d at 30 ("Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under RRTA to pay for those benefits.").

The Eighth Circuit's ruling also conflicts with the IRS regulation providing that pay for time lost is part of "compensation" subject to the payroll tax. 26 C.F.R. §§ 31.3231(e)-1(a)(3)-(4). While the other courts had followed the IRS interpretation, the Eighth Circuit held that the IRS regulations "receive no deference under *Chevron* ...." (App. 24a.) The Eighth Circuit thought itself constrained by the statutory language to reach a result that did not make sense and that ultimately could lead to the underfunding of benefits. (App. 20a-24a.)

D. The Eighth Circuit's Interpretation Raises Serious Concerns for BNSF and the Railroad Industry

This multi-faceted conflict creates a particular problem for BNSF, which is an interstate freight railroad and has employees in Missouri, Nebraska, and Iowa, as well as 25 other states.

There is no uniform rule of law. Under the current state of affairs, employees receive highly variable tax treatment of their FELA awards depending upon where they file suit. While BNSF will withhold RRTA taxes from judgments for lost damages issued in Iowa or Nebraska state court, it is not authorized to withhold RRTA taxes from judgments issued in federal court or Missouri state court. Thus, railroad employees in district courts within the Eighth Circuit and Missouri state court will bring home more money than similarly-situated employees in Nebraska or Iowa state court.

The issue is even more complicated in those situations where the employee has not filed suit in any court but makes a claim for time lost due to a workplace injury. The parties may want to negotiate a settlement that includes pay for time lost, without any litigation. Because the forum is not known and there is a split in the federal and state courts on the issue, the RRTA tax obligations on the settlement are uncertain.

This question has far-reaching implications for the Class 1 railroads and their 152,000 employees.[9] There are over 4000 on-the-job incidents each year,[10] with total FELA payments in the hundreds of millions of dollars. In light of the significant tax implications, it should come as no surprise that the litigation over this issue has exploded over the last few years. The issue has reached different appellate courts almost every year – the Nebraska Supreme Court in 2013, the Supreme Courts of Iowa and Missouri in 2014, the Pennsylvania appellate court in 2016, and the Eighth Circuit in 2017. The issue is currently pending in other appellate courts including Illinois and Alabama. With multiple years of litigation producing a split in the federal and state courts, the time is ripe for the Court to intervene.

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[9] *See* Class 1 Railroad Statistics, published by the Association of American Railroads (May 1, 2017), *available at* https://www.aar.org/Documents/Railroad-Statistics.pdf.

[10] *See* Federal Railroad Administration, Ten Year Accident/Incident Overview, http://safetydata.fra.dot.gov/officeofsafety/publicsite/query/TenYearAccidentIncidentOverview.aspx.

The implications of the Eighth Circuit's decision extend well beyond the employee's share of taxes on time-lost in FELA awards. The Eighth Circuit interpreted "compensation" under the RRTA as limited to pay for services "an employee actually renders ...." (App. 20a.) As the United States has indicated, this interpretation puts into question RRTA taxes on other forms of compensation that do not relate to actual services rendered – i.e., vacation pay, sick pay, or severance pay – which have historically been taxed by the IRS.[11] Under the Eighth Circuit's opinion, the Class 1 railroads and their 152,000 employees would not be required to pay RRTA taxes on those forms of payment. And the railroads and their employees would be entitled to a refund for prior payments withheld and paid to the IRS pursuant to the IRS's interpretation.

This Court has long stressed the importance of a nationally uniform tax system. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). When one taxpayer "is accorded a tax treatment different from that given to other taxpayers of the same class," the result is "inequalities in the administration of the revenue laws, discriminatory distinctions in tax

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[11] *See* U.S. Amicus Br. 12, available at *available at* 2017 WL 6885570 (arguing that the Eighth Circuit's limited interpretation of taxable compensation leads to "the absurd result that numerous standard forms of compensation, such as sick pay and vacation pay, would no longer qualify as 'compensation" under the RRTA").

liability, and a fertile basis for litigious confusion." *Id.*

The differences in the federal taxes applicable to FELA awards are particularly objectionable. This Court has repeatedly held that the FELA was designed to create a nationally uniform remedy for railroad employees. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988). In particular, there was to be equal treatment of FELA cases brought in state court as compared to those brought in federal court. The Eighth Circuit's decision guarantees that railroad workers will be treated differently in federal court.

II. The Decision Below Conflicts With This Court's Precedent

The Eighth Circuit relied on two aspects of the statutory definition of "compensation" to reach what it called the "plain meaning" of the statute. First, the court interpreted the phrase "for services rendered" as requiring actual performance of services. (App. 20a.) Then, the court looked to the "history" of the RRTA, from which the Court inferred a congressional intent to exclude time-lost payments from RRTA taxes. (App. 21-22a.) The United States has maintained that for both rationales, the Eighth Circuit's opinion is wrong and in tension with this Court's precedent. These methodological errors underlying the Eighth Circuit's decision, as pointed out by the United States, are themselves grounds for consideration in this Court.

A. The Decision Below Conflicts With This Court's FICA Precedent

The Eighth Circuit found that pay for time lost could not qualify as "compensation" because it was inherently inconsistent with that part of the definition that described compensation as remuneration for "services rendered." (App. 20a.) In the Eighth Circuit's view, the "plain language" of compensation is limited to pay for services "actually rendered." (App. 20a.)

As the United States has observed, the Eighth Circuit's "ruling is in conflict with the Supreme Court's holdings in the analogous Social Security context that back pay and severance pay constitute taxable wages." U.S. Amicus Br. 14, *available at* 2017 WL 6885570. In cases interpreting FICA, this Court has interpreted pay for services broadly: "We think that 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014) (relying on *Neirotko* to deem severance payments "wages" under the FICA).

The Eighth Circuit stated that the FICA precedent could not be relied upon because FICA taxes payment for "employment," while the RRTA taxes payment for "services." (App. 20a.) But FICA defines "employment" to mean "any service ... performed ...." 26 U.S.C. § 3121(b) ("the term 'employment' means any service, of whatever nature,

performed ...."). Thus, the critical point is not any difference in the use of the words "employment" and "services" but in the *underlying* similarity – both terms turn on the concept of service performed. This Court was satisfied that Congress could have intended that concept to encompass the whole relationship, not an individual part of it. *Nierotoko*, 327 U.S. at 365-66. *Nierotko* and *Quality Stores* demonstrate that it is possible to construe pay for time lost, like vacation pay, as part of the package of benefits that an employee receives for services rendered. Thus, the Eighth Circuit reached a conclusion that is inconsistent with this Court's precedent.

B. The Decision Below Conflicts With This Court's *Chevron* Precedent

The Eighth Circuit's narrow construction of the RRTA also conflicts with this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That decision prescribes a familiar two-step analysis for review of an agency regulation: (1) determine whether "Congress has directly spoken to the precise question at issue" by "employing traditional tools of statutory construction" and (2) if the relevant statute is found to be ambiguous, determine whether the agency's interpretation of the statute is reasonable. *See id.* at 842. *See also Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 53 (2011).

Subsequent decisions of this Court have illustrated the meaning of "traditional tools of statutory construction." They include the language,

statutory structure, and legislative history of the statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-49 (1987); *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 613 (1991); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law ....'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *see also United Savings Ass'n of Texas v. Timbers of Indwood Forest Ass., Ltd.*, 484 U.S. 363 (1988) ("Statutory interpretation ... is a holistic endeavor."). This holistic approach is especially appropriate here, where the two statutes represent different sides of the same coin. *See Standard Office Bldg.*, 819 F.2d at 1373 (RRA represents "the expenditure system of the coin," and the RRTA "is the revenue side"); *Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 856 & n.5 (11th Cir. 1986) (Because these "statutes are interrelated parts of an overall plan designed to benefit railroad employees," the "definitions should be construed and applied identically.").

Here, the meaning of "compensation" in the RRTA is clarified by the more detailed definition of that term in the related statute, the RRA. Both the RRTA and RRA define "compensation" to mean "any form of money remuneration paid to an individual for services rendered as an employee ...." 45 U.S.C. § 231(h)(1) (App. 41); 26 U.S.C. § 3231(e)(1) (App. 33a.) The RRA's definition of "compensation" then proceeds to identify explicitly some of the types of payments that are covered by this term – "including remuneration paid for time lost as an employee ...."

45 U.S.C. § 231(h)(1) (App. 41.) Thus, the RRA definition illuminates the meaning of this term as used in the RRTA. It confirms that the phrase "services rendered" is broad enough to encompass pay for time lost. This guidance is particularly valuable because the RRA and RRTA address the same program and should be read *pari materia*. *See* App. 21a. As the Iowa Supreme Court explained, "[t]he RRA and the RRTA are inextricably interconnected because the latter funds the former." *Phillips*, 853 N.W.2d at 649; *see also* U.S. Amicus Br. at 20, *available at* 2017 WL 6885570 ("We submit that this reasoning [of the Eighth Circuit] is wrong, as the two statutes clearly are related.").

Even focusing on only the RRTA's definition of compensation, the Eighth Circuit's reading rests on an impermissible parsing of the text. According to the court, "plain language of the RRTA refers to services that an employee *actually* renders, not to services that the employee would have rendered but could not." (App. 20a) (emphasis added.) The Eighth Circuit's interpretation rests on a word – "actually" – that does not appear in the statute and that is being imported into the statute by the court.

Indeed, if Congress intended to exclude time-lost payments from the definition of "compensation," it could have expressly done so. The RRTA itemizes several exclusions from the term compensation, but not one for time-lost payments. 26 U.S.C. § 3231(e) (App. 33a-40a). That omission casts serious doubt on any interpretation that Congress intended to exclude

these payments. The statutory language is at best ambiguous.

With little support for its position in the current statute, the Eighth Circuit relied upon what it viewed as the statutory "history" – the statutory amendments in 1975 and 1983. However, its history was incomplete. The court failed to take into account the legislative history of these amendments, which illuminates the reasons for those changes. The United States points out that other courts have studied the 1975 amendment to the RRTA and found that it accomplished an administrative change only. *See* U.S. Amicus Br. 13-19, *available at* 2017 WL 6885570. "Nothing in the legislative history indicates that Congress intended to change the substantive definition of 'compensation.'" *Chi. Milwaukee Corp. v. U.S.*, 35 Fed. Cl. 447, 455 & n.6 (1996). As the United States explains, the legislative history of the 1975 amendment reveals that the effect of this change was to overrule an IRS Revenue Ruling and "to clarify that compensation would ordinarily be taxed on an 'as paid' basis rather than as attributed unless the employee requested otherwise." U.S. Amicus Br. 16, *available at* 2017 WL 6885570. Its purpose was to change the timing rules for when (not whether) to assess payroll taxes. *See id.*; *see also Phillips*, 853 N.W.2d at 641 n.2, 646-47, 649-50; *Atchison, Topeka & Santa Fe Ry. v. U.S.*, 628 F. Supp. 1431, 1435-38 (D. Kan. 1986).

The Eighth Circuit panel also mentioned the 1983 amendment to the RRTA's definition of compensation. (App. 23a.) As the United States has

explained, this technical amendment was necessary to shift the definition of compensation from a monthly wage base to an annualized wage base. *See* U.S. Amicus Br. 17-18 (available at 2017 WL 6885570), citing H. Rep. No. 98-30, 98th Cong., 1st Sess. p. 21 (1983). "There was no discussion anywhere in the legislative history indicating that Congress no longer intended to treat pay for time lost as compensation." *Id.* In fact, "it would have been anomalous for Congress, in enacting legislation designed to shore up the financial stability of the railroad retirement system, to continue to treat payment for time lost as compensation for RRA benefits while at the same time exempting it from RRTA taxation." *Id.*

Because Congress has not "directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842), the Eighth Circuit should have deferred to the Treasury regulation. Instead, the Eighth Circuit reached a result that is in conflict with other courts, with the IRS regulation, and with a sensible approach to funding.

III. This Is An Ideal Vehicle To Address the Exceptionally Important Issue

This case is a particularly well-suited vehicle for resolving the entrenched split.

First, the factual predicate is clear: there is no question that a portion of plaintiff's FELA judgment consisted of pay for lost time. The verdict form in this case contained a separate line for lost pay, and the jury awarded a specific amount. (App. 26a.)

This case is unlike others in which courts have struggled with general verdicts that did not specifically indicate whether the award covered pay for lost time.[12] The use of the special verdict in this case permits the Court to focus on the interpretation of the RRTA without the distraction of interpreting a general verdict.

Second, the legal predicate is clear. The IRS regulation defining "compensation" for purposes of the RRTA explains: "The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer ...." 26 C.F.R. §31.3231(e)-1(a)(3) (App. 46a-47a). The regulation then states: "Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation *as well as pay for time lost.*" 26 C.F.R. §31.3231(e)-1(a)(4) (App. 47a) (emphasis added). Thus, if the regulation is permissible under *Chevron*, there is no doubt that it requires taxation. (App. 19a.)

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[12] *See, e.g., Mickey*, 437 S.W.3d at 208, 216 ("judgment is based on a general verdict that does not state that any part of the award is for lost wages"); *Heckman*, 837 N.W.2d at 537-538 (general verdict presumed under state law to be based at least in part on lost wages); *Phillips*, 853 N.W.2d at 643-45 (same); *Liberatore*, 140 A.3d at 30-32 (same).

Third, the responsible federal agency has taken a firm position. The IRS has not only promulgated the regulation, but reconsidered it in light of the evolution of the statute and insisted on its validity. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66187 (Dec. 23, 1994). The United States has defended the IRS's regulation in six amicus briefs filed in courts around the country.[13] The agency's position is consistent, vigorous, and well-known.

Finally, this case raises an issue distinct from *Wisc. Central LTD v. United States*, 856 F.3d 490 (7th Cir. 2017), *cert granted*, No. 17-530, 2018 WL 386569 (Jan. 12, 2018). In that case, a railroad challenges the Seventh Circuit's holding that nonqualified stock options constitute compensation subject to tax under the RRTA. While the case involves the same statutory provision as this one, it

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[13] The six amicus briefs are: (1) Brief of United States as Amicus Curiae in support of Appellant, *Munoz v. Norfolk Southern Ry. Co.* (Illinois App.), *available at* 2017 WL 6885570; (2) Brief of Amicus Curiae United States of America (Pa. Super.), *available at* 2015 WL 10489910; (3) Brief of United States as Amicus Curiae in support of Appellee and in support of Affirmance, *Phillips v. Chicago, Central & Pacific R.R. Co.* (Iowa), *available at* 2013 WL 11262292; (4) Brief of United States as Amicus Curiae in support of Appellant and in support of Reversal, *Mickey v. BNSF Ry. Co.*, (Missouri), *available at* 2013 WL 210157; (5) Brief of United States as Amicus Curiae in support of Appellant and in support of Reversal, *Heckman v. Burlington Northern Santa Fe R.R. Co.*, (Nebraska), *available at* 2013 WL 1809429; (6) Brief of United States, *Norfolk S. Ry. Co. v. Williams*, No. 2160823 (Alabama App.)

turns on a different phrase – money remuneration – and implicates different questions of interpretation. This case should be heard on its own merits. It should not be held for *Wisconsin Central*.

In the absence of a decision by this Court resolving the conflict, the question of whether railroads should withhold RRTA taxes on time-lost payments will continue to foment recurring and wasteful litigation. Disparate treatment of otherwise identically situated taxpayers will continue and the applicable rule will depend upon the court forum. Resolution of this recurring question by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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January 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, FILED AUGUST 3, 2017

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 15-3355, No. 16-1123

MICHAEL D. LOOS,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellee,

AMERICAN ASSOCIATION FOR JUSTICE,
AMICUS ON BEHALF OF APPELLANT(S)

MICHAEL D. LOOS,

Plaintiff-Appellee.

v.

BNSF RAILWAY COMPANY,

Defendant-Appellant.

Appendix A

UNITED STATES OF AMERICA, AMICUS ON BEHALF OF APPELLANT(S) AMERICAN ASSOCIATION FOR JUSTICE, AMICUS ON BEHALF OF APPELLEE(S)

Submitted: June 6, 2017
Filed: August 3, 2017

Before WOLLMAN, ARNOLD, and GRUENDER, Circuit Judges.

OPINION

GRUENDER, Circuit Judge.

Michael D. Loos brought two claims against BNSF Railway Company: a retaliation claim under the Federal Railroad Safety Act ("FRSA") and a negligence claim under the Federal Employers Liability Act ("FELA"). The district court[1] granted BNSF summary judgment on the retaliation claim, but the negligence claim proceeded to trial where a jury rendered a verdict in favor of Loos. Loos appeals the grant of summary judgment to BNSF on his retaliation claim. BNSF cross-appeals denial of its motion to offset the amount of tax BNSF argues the Railroad Retirement Tax Act ("RRTA") requires it to withhold from the judgment on Loos's FELA claim. For the following reasons, we affirm both decisions.

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1. The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

Appendix A

I. Background

Loos worked for BNSF for fifteen years as a conductor, brakeman, and switchman before BNSF fired him on November 29, 2012. During his employment, Loos made a number of safety reports, and he served on BNSF's site safety committee for an unspecified period in 2007 and 2008.[2] Between 2006 and his dismissal, Loos accumulated a number of attendance violations. The BNSF attendance policy allows each employee a certain number of absences during each three-month rolling period. If an employee exceeds the number of allowed absences during a given three-month period, BNSF disciplines the employee in accordance with a schedule of progressively increasing punishments. The first violation results in a formal reprimand, the second violation in a ten-day record suspension, the third in a twenty-day record suspension, and the fourth in a possible discharge. The employee also may be subject to dismissal, among other reasons, for having an active "Level S" violation (denoting a significant rule violation) on his record and accumulating three active attendance violations. Attendance violations remain active until the employee works one year without a new attendance violation. An employee may also request alternative handling, under which the employee agrees to participate in a plan designed to reduce future violations and, in return, does not receive an attendance violation.

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2. The record includes documents relating only to one safety report-a request Loos made in September 2007 for two defibrillators-but Loos testified he frequently filed safety reports and followed up with supervisors about them.

Appendix A

Loos violated the policy twice in 2006, receiving first a formal reprimand, then a ten-day record suspension. In 2008, Loos violated the policy twice, receiving alternative handling and then a formal reprimand. After the second 2008 violation, Loos received a letter from his supervisor explaining that Loos worked between about thirty and forty hours per month during October and November of 2008 while his peers worked an average of 170 hours per month. The supervisor warned him that continuing to work less than full-time work hours would be considered an attendance violation. However, on June 15, 2009, Loos admitted another attendance violation and received a Level S ten-day record suspension. On March 22, 2010, Loos violated attendance rules by failing to notify a supervisor of the nature of a family-emergency absence within twenty-four hours and received alternative handling. That same month, Loos violated the attendance policy again and received a Level S thirty-day record suspension. BNSF then placed Loos on a three-year probation period during which "[a]ny rules violation ... could result in further disciplinary action." Loos's attendance problems continued, and BNSF warned him in July 2010 that if he did not maintain full-time work hours, it would be considered another Level S violation.

On December 19, 2010, Loos twisted his knee when he fell into a snow-covered drainage grate in the train yard. He reported the workplace injury and missed work until May 16, 2011 when his orthopedist released him to work without restrictions. Later in May, Loos requested and was denied leave under the Family Medical Leave Act ("FMLA"), because he had not worked a sufficient number

of hours in the previous year to qualify. The FMLA request did not include a statement from his doctor or any other form of medical documentation. In the summer of 2011, Loos requested to use the "injury on duty" ("ION") code to take excused absences due to flare-ups of his knee injury. His supervisor, Matt Bailey, initially responded that the ION code was not available to him because "[w]e don't do it anymore."[3] When Loos pressed him further, Bailey stated, "I won't authorize it, and that's the end of it." In his deposition, Bailey clarified that the ION code is available, but it requires medical documentation and clearance through the medical department—a policy, Bailey admitted, that is not written down and which he did not communicate to Loos. Later in 2011, Loos violated the attendance policy twice, and he received first a formal reprimand and then a ten-day record suspension. Loos testified in his deposition that at least one of these violations resulted from injury flare-ups, but he ultimately admitted the violations and waived his right to a formal investigation both times. After the second 2011 violation, BNSF placed Loos on a one-year review period.

In January 2012 Loos testified on behalf of two former co-workers, Paul Gunderson and David Peterson, in a hearing before a Department of Labor administrative law judge considering Gunderson and Peterson's claims

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3. The testimony of two former BNSF employees, Donald Mullins and George Joyce, suggests that BNSF may have stopped allowing the ION code for injury flare-ups after it instituted the attendance policy, possibly because of the belief that classifying such absences as injuries on duty could render them reportable under FRSA as separate incidents of injury on duty.

against BNSF for retaliatory dismissal under FRSA.[4] BNSF authorized Loos's absence to testify, but, shortly after the hearing, it sent Loos an investigation notice relating to the day of work he missed to testify. In a related meeting, trainmaster Greg Jaeb, a supervisor, asked for a copy of the subpoena and stated that "this could be bad for you." It is unclear whether Jaeb was referring to Loos's testimony or to the effect of an attendance violation. BNSF did not ultimately require Loos to produce the subpoena and later canceled the investigation.

In the three-month period between May and July 2012, Loos missed eight-and-a-half weekdays and two weekend days. For that period, the attendance policy allowed him to miss only seven-and-a-half weekdays and no weekend days. He missed five days due to knee-injury flare-ups, two days (including Sunday, July 8) for personal reasons, and one-and-a-half days for a family emergency. During the three-month period, Loos had requested and was denied permission to use the "ION" code to designate his knee-injury-related absences as excused. BNSF emphasized that it denied Loos's request because he did not provide medical documentation. BNSF issued an investigation notice in August 2012 and held a formal investigation on November 16, 2012. In the interim, Loos submitted a second FMLA request in September 2012, including a statement from his doctor. At the hearing, Loos submitted a note from his doctor dated November 6, 2012, explaining that he would have to miss work because of knee-injury

4. This court considered Gunderson's claim earlier this year. See *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 963 (8th Cir. 2017).

flare ups and that these issues were present during May, June, and July of 2012. The BNSF investigator found that Loos had violated the attendance policy. Thus, as Loos had accumulated a total of three active attendance violations and an active Level S violation, BNSF dismissed Loos.

Loos filed suit on December 9, 2013, alleging that BNSF retaliated against him in violation of FRSA and that BNSF was liable under FELA for negligently causing his knee injury. The district court granted BNSF summary judgment on Loos's FRSA claim, but Loos's FELA claim proceeded to trial. The jury ruled in Loos's favor and awarded $85,000 for past pain, disability, and emotional distress; $30,000 for lost wages; and $11,212.78 for past medical expenses. BNSF moved under Federal Rule of Civil Procedure 59(e) for the court to offset the lost wages award by the amount of Loos's share of taxes owed under the RRTA. The district court found that no RRTA tax was owed on the award and denied BNSF's motion. In February 2016, BNSF partially satisfied the judgment, withholding from the payment the amount of the disputed RRTA taxes. Loos appeals summary judgment on his FRSA claim, and BNSF cross-appeals the district court's determination with respect to RRTA taxes.

II. Discussion

A. FRSA Retaliation Claim

"We review a district court's grant of a motion for summary judgment de novo, viewing all evidence and drawing all reasonable inferences in the light most

favorable to the nonmoving party." *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 726 (8th Cir. 2017) (quotation omitted). "Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotations omitted). FRSA provides that a railroad "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done ... to notify ... the railroad carrier ... of a work-related personal injury" or to cooperate with a federal investigation. 49 U.S.C. § 20109(a)(1), (4), (5). A railroad likewise may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for ... reporting, in good faith, a hazardous safety or security condition." *Id.* § 20109(b)(1)(A). We analyze FRSA retaliation claims in two steps. First, the plaintiff must make a *prima facie* case. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(i)). If the plaintiff satisfies this requirement, the railroad has the opportunity to demonstrate by clear and convincing evidence that it would have discharged the employee even if he had not engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(ii)).

To make a *prima facie* case, Loos must demonstrate: that (1) "he engaged in protected activity"; (2) BNSF "knew or suspected, actually or constructively, that he engaged in the protected activity"; (3) "he suffered an adverse action;" and (4) "the circumstances raise an inference that the protected activity was a contributing factor in the adverse action." *See id.* The parties do not dispute that

Loos engaged in protected activity of which BNSF was aware and that Loos suffered an adverse action. Thus, we need only determine whether a genuine dispute exists as to the final prong—whether the circumstances raise an inference that Loos's protected activity was a contributing factor to his discharge. "[A] contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 791 (quotation omitted). Though the employee need not "conclusively demonstrate the employer's retaliatory motive," *id.*, he must show that intentional retaliation prompted by a protected activity was a contributing factor, *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 722 (8th Cir. 2017).[5] To determine whether the circumstances raise an inference of retaliatory motive in the absence of direct evidence, we consider circumstantial evidence such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence of intervening events that independently justify discharge. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 5, at *3 (U.S. Dep't of Labor Feb. 29, 2012); *Gunderson*, 850 F.3d at 969. The court also takes "into account the evidence of the employer's nonretaliatory reasons." *Gunderson*, 850 F.3d at 969 (quotation omitted).

5. Although Loos cites to *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013), which employs a more lenient standard, we explained in *Blackorby v. BNSF Railway Co.* that the Eighth Circuit follows *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), not *Araujo*. 849 F.3d at 721-22.

Loos argues that BNSF dismissed him in retaliation for one or more of three protected activities: (1) submitting safety reports and serving on the safety committee, (2) reporting an on-duty injury, and (3) testifying in the Peterson-Gunderson FRSA hearing. None of these activities occurred in temporal proximity to Loos's discharge. Loos served on the safety committee between 2007 and 2008, approximately five years prior to his dismissal. Likewise, the safety report documented in the record occurred in 2007.[6] Loos reported his on-duty injury in 2010, almost two years prior to his dismissal, and he testified in the Peterson-Gunderson hearing approximately ten months prior to his dismissal. By comparison, Loos's attendance violations began before the protected activities occurred and continued consistently until his discharge. *Kuduk* explained that more than a temporal proximity is required to find retaliatory motive "especially ... when the employer was concerned about a problem before the employee engaged in the protected activity." 768 F.3d at 792 (quotation omitted). Here, not even temporal proximity is present, and BNSF's concern with Loos's attendance problems well predated the protected activities. Moreover, the violation that prompted Loos's dismissal occurred because Loos missed a weekend day for personal reasons and, thus, the violation was unrelated to any protected activity.

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6. Loos testified, and we assume as true for purposes of summary judgment, that he made other safety reports throughout his employment. However, he does not assert or provide evidence that such reports occurred in close proximity to his firing.

The thrust of Loos's argument is that BNSF retaliated against him by refusing to allow him to use the ION code when his injury flared up. Although using the ION code would not have prevented the 2012 attendance violation that ultimately prompted Loos's dismissal, it would have prevented his 2011 violations.[7] Without the 2011 violations, Loos would not have had a sufficient number of active attendance violations to qualify for dismissal under the policy.[8] Thus, the argument goes, if BNSF refused the ION code in retaliation for Loos reporting the injury, that retaliatory motive contributed to his dismissal. However, the evidence does not support the conclusion that BNSF acted with such a retaliatory motive.

When Loos requested to use the ION layoff code for flare-ups of his injury, the only medical documentation BNSF had was the letter from Loos's doctor releasing him to work without restriction. Loos did not provide any medical documentation until his September 2012 FMLA leave request and the November 2012 letter from his doctor explaining that flare-ups would have been occurring during May, June, and July of 2012. BNSF did not have either of these documents in 2011 when it

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7. We take as true for purposes of summary judgment Loos's testimony that one or both of these violations were due to injury flare-ups for which BNSF denied the ION code.

8. BNSF contends that Loos cannot now challenge his 2011 attendance violations because he admitted the violations and waived formal investigation, and the statute of limitations for such challenge has expired. We need not decide this question, because even if we consider the 2011 violations Loos has not presented sufficient evidence of retaliatory motive.

refused the ION code. Rather, the information BNSF had at the time it refused the ION code indicated that Loos was fit for work without restriction.[9] *See Gunderson*, 850 F.3d at 969 ("The critical inquiry in a pretext analysis is ... whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge." (quotation omitted)). Loos fails to provide evidence that this reason is inconsistent or pretextual. First, Loos points to testimony asserting that BNSF allowed another employee—Jake Kluver—to use the ION code for absences due to flare-ups of an injury after he was released to work without restriction. However, Loos has not carried his burden to demonstrate that Kluver was "similarly situated in all relevant respects." *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994). Loos did not present evidence that Kluver failed to provide medical documentation, and without evidence to that effect we cannot conclude that Kluver was similarly situated in all relevant respects and, thus, that his experience demonstrates BNSF acted inconsistently.

Loos emphasizes the testimony of Mullins and Joyce, two former BNSF employees who asserted that BNSF unofficially stopped allowing the ION code for injury flare-ups in 2000 when it instituted the attendance policy because of concerns its use would alter BNSF's injury-

9. Loos also emphasizes that the jury verdict in his FELA claim, which awarded damages for pain, disability, and emotional distress for a period including the 2011 violations, confirms that Loos was attempting to take time off because of his injury. However, this does not illuminate BNSF's intent at the time it disciplined Loos.

reporting obligations under FRSA.[10] The district court did not consider Mullins's and Joyce's testimony because Loos failed to disclose them as experts at the appropriate time. Loos does not expressly challenge this decision, but even if we consider Mullins's and Joyce's testimony, it does not support an inference of retaliatory motive. If BNSF indeed had an across-the-board practice of disallowing the ION code for injury flare-ups, the denial in Loos's case would not be evidence that BNSF intended to retaliate against him specifically for protected activity. As such, whether or not such a policy, if it existed, would be fair is not at issue here. *See Gunderson*, 850 F.3d at 970 ("[I]f the discipline was wholly unrelated to protected activity ... whether it was fairly imposed is not relevant to the FRSA causal analysis.").

Loos also points to a 2011 exchange between himself and Bailey, a supervisor, related to Loos's ION code request. Loos testified that Bailey refused to authorize the ION code because it was not available to him. When Loos pressed for further explanation, Bailey responded, "It's just not [available]. We don't do it anymore." This statement is susceptible to two interpretations. On the one hand, it supports Mullins's and Joyce's testimony that BNSF categorically denied ION code use for flare-ups after 2000. As described above, such a situation does not support an inference of retaliatory motive against Loos. Second, the statement may be interpreted to mean that Loos could not use the ION code anymore because he had been released to work without restriction. That

10. BNSF strongly contests this assertion.

interpretation, likewise, does not support an inference of retaliatory motive because it supports BNSF's explanation that it denied the ION code because Loos failed to provide the necessary medical documentation. Next, Loos points to an exchange that took place in 2010 or 2011 between Phillip Mullen, the terminal superintendent, and Jeremy Brown, a BNSF switchman and the switchmen's union local chairman, in which Mullen expressed significant frustration with Loos's low attendance during a monthly local chairmen's meeting. Nothing in the exchange implies that any scrutiny of Loos's attendance was a pretext to punish him for protected activities.

Loos's final argument with respect to the 2011 violations consists of the assertion that BNSF should have granted Loos FMLA leave in 2011, even though he was not eligible. This refusal to make a special exception to FMLA requirements, Loos contends, demonstrates retaliatory motive. We disagree. A railroad may refuse to make a policy exception without retaliatory motive, and Loos points to nothing else surrounding the FMLA denial that would indicate retaliatory motive drove that decision.

Likewise, the circumstances surrounding Loos's testimony in the Peterson-Gunderson hearing ultimately do not support an inference of retaliatory motive. After Loos testified at the hearing, he received an investigation notice for the day he missed to testify and Greg Jaeb, one of his supervisors, asked to see the subpoena. During the exchange, Jaeb opined that "this could be bad for you." Loos never produced the subpoena, and BNSF canceled the investigation. In order for Jaeb's

statements to constitute evidence of retaliatory motive on the part of BNSF, there must be "proof that a supervisor 'perform[ed] an act motivated by [discriminatory] animus that is ***intended*** by the supervisor to cause an adverse employment action ... if that act is a proximate cause of the ultimate employment action.' " *Gunderson*, 850 F.3d at 970 n.9 (alterations and omissions in original) (quoting *Kuduk*, 768 F.3d at 790). Even assuming it expresses retaliatory animus, no evidence in the record supports the conclusion that Jaeb's statement reflected the intent of BNSF or influenced the ultimate decision-maker. BNSF rescinded the investigation notice shortly after the exchange, and the attendance violation that led to Loos's dismissal was completely unrelated. Loos presented no evidence that Jaeb influenced John Wright, the BNSF investigator who presided over the November 2012 investigation hearing, or that the investigation itself resulted from Jaeb unfairly reporting Loos to superiors. *See Ludlow v. BNSF Ry. Co.*, 788 F.3d 794, 802 (8th Cir. 2015) (finding state-law retaliation where hostile supervisors provided the only source of information to the decision-maker, who in turn rubber-stamped their recommendations); *Richardson v. Sugg*, 448 F.3d 1046, 1060 (8th Cir. 2006) (explaining that if a decision-maker "makes an independent determination as to whether an employee should be terminated and does not serve as a mere conduit for another's discriminatory motives," that person's discriminatory motive is not a contributing factor).

Finally, Loos points to two exchanges during the investigation hearing that he contends demonstrate his dismissal was "preordained" and driven by retaliatory

motive. First, Loos argues that Wright was reluctant to admit into evidence Loos's September 2012 FMLA application and the November 6, 2012 doctor's note. This reluctance, Loos contends, demonstrates that the dismissal was "preordained." However, the record demonstrates that Wright merely questioned the relevance of medical documentation from September and November to a violation that occurred during May, June, and July. After stating this reservation, Wright admitted the evidence. The record does not support Loos's characterization of Wright's conduct as demonstrating he intended to discharge Loos regardless of what the evidence showed. Second, Loos points to an exchange between Loos's union representative, Jeff Pientka, and Wright. When Pientka harangued Wright at length for reasons unrelated to the subject of the investigation, Wright informed Loos that he would ask Loos to find a different union representative if Pientka could not refrain from disrupting the investigation. After Wright allowed Loos and Pientka a recess to confer, the investigation proceeded without further disruption. Loos characterizes this exchange as intimidating and evincing retaliatory intent, but the record does not support that conclusion.

In sum, the evidence does not raise a genuine dispute that retaliatory motive prompted by protected activity contributed to Loos's dismissal. As a result, Loos has failed to make a *prima facie* case and, accordingly, we affirm the district court's decision to grant BNSF summary judgment on Loos's FRSA retaliation claim.

B. RRTA Tax Withholding

In relation to Loos's successful FELA claim, BNSF cross-appeals the district court's denial of its Rule 59(e) motion seeking to set off the amount of RRTA tax that it argues it is required to withhold and to remit from the portion of Loos's recovery designated for lost wages. The district court denied the requested offset, determining that the income tax exclusion for personal-injury awards, *see* 26 U.S.C. § 104(a)(2), excepted the award for lost wages from RRTA taxation. We review for an abuse of discretion a district court's denial of a Rule 59(e) motion to amend or alter the judgment. *Avon State Bank v. BancInsure, Inc.*, 787 F.3d 952, 959 (8th Cir. 2015). However, "where the Rule 59(e) motion seeks review of a purely legal question," *id.* at 959 n.3, "the district court abuses its discretion if it makes a legal error," *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011).

The Railroad Retirement Act ("RRA"), 45 U.S.C. §§ 231-231v, is the railroad-industry equivalent to the Social Security Act ("SSA") and provides retirement benefits funded by employment taxes collected under the RRTA, 26 U.S.C. §§ 3201-02, 3211-12, 3221, 3231-33, 3341; *see Cowden v. BNSF Ry. Co.*, No. 4:08CV01534 ERW, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014) (unpublished). The RRTA imposes two tiers of taxes, which are levied against both the employee and the employer based on the amount of the employee's compensation. *Cowden*, 2014 WL 3096867, at *2. Tier 1 taxes "are analogous to taxes imposed on nonrailroad workers by the Federal Insurance

Contributions Act (FICA)." *Id.* Tier 2 taxes provide benefits similar to a private multi-employer pension fund. *Id.* (citing *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 522 (6th Cir. 2009)). Though closely related, the RRA and RRTA are administered by separate administrative agencies (the Railroad Retirement Board ("RRB") and the Internal Revenue Service ("IRS"), respectively), *see id.*, and operate under separate regulations, *compare* 20 C.F.R. §§ 201-206, 209-12, 216-22, 225-30, 232-38, 240, 243, 250, 255, 258-62, 266, 295 (implementing the RRA) *with* 26 C.F.R. §§ 31.3201-02, 31.3211-12, 31.3221, 31.3231 (implementing the RRTA).

Both the RRA and the RRTA define the term "compensation." *See* 45 U.S.C. § 231(h); 26 U.S.C. § 3231(e). The RRA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers ... including remuneration paid for time lost as an employee." 45 U.S.C. § 231(h)(1). The RRA defines "pay for time lost" as "the amount [the employee] is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury." *Id.* § 231(h)(2). The RRB has interpreted that definition to encompass FELA judgment awards for lost wages and, thus, considers FELA judgment awards when calculating the employee's benefits. *See* Railroad Retirement Board, Railroad Retirement Service Credits and Pay for Time Lost 2 (2011).

The RRTA also defines "compensation" as "any form of money remuneration paid to an individual for services

rendered as an employee to one or more employers" but does not expressly include pay for time lost. 26 U.S.C. § 3231(e)(1). The IRS interprets "compensation" under the RRTA as having "the same meaning as the term wages in [FICA] ... except as specifically limited by the [RRTA] ... or regulation." 26 C.F.R. § 31.3231(e)–1(a)(1). The regulation further provides that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer ... as well as pay for time lost." *Id.* § 31.3231(e)–1(a)(3)-(4). Under this regulation, damages for lost wages fit well within the definition of "compensation." Loos challenges this interpretation of the RRTA.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, we must first determine whether "Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If so, "that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

Although damages for lost wages are a "form of money remuneration paid to an individual," the RRTA only considers such remuneration "compensation" if it is paid "for services rendered as an employee." In cases interpreting FICA, the Supreme Court has defined this

concept broadly to refer to "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66, 66 S.Ct. 637, 90 L.Ed. 718 (1946) (deeming the SSA to cover back pay); *United States v. Quality Stores, Inc.*, ——U.S. ——, 134 S.Ct. 1395, 1400, 188 L.Ed.2d 413 (2014) (relying on *Neirotko* to deem severance payments "wages" under FICA). However, we recently determined that the FICA definition cannot be imported into the RRTA because "instead of taxing payment for 'services,' the FICA taxes payment for 'employment,' which is defined broadly...." *Union Pac. R.R. Co. v. United States*, No. 16-3574, 865 F.3d 1045, 1053, 2017 WL 3254390 (8th Cir. Aug. 1, 2017) (citing 26 U.S.C. § 3121(b)). Accordingly, we cannot rely upon cases interpreting the language of FICA to expand the RRTA's definition of "services rendered" to encompass the entire employee-employer relationship generally. *Id.*

Under the RRTA's plain text, damages for lost wages are not remuneration "for services rendered." Damages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services. Instead, the damages compensate the employee for wages the employee should have earned had he been able to render services. Unlike FICA, the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not. *See* 26 U.S.C. § 3231(e)(1); *see also id.* § 3231(d) (defining "service"). Thus, damages for lost wages do not fit within the plain meaning of the RRTA.

On the other hand, BNSF and the Government contend that the RRA and RRTA are *in pari materia*, and, thus, we should read the RRA definition of "compensation" into the RRTA. The RRA and RRTA, they argue, accomplish a unified purpose: the RRA provides benefits, while the RRTA funds them. Thus, because the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits. *See Phillips v. Chi. Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 649 (Iowa 2014); *accord Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29 (Sup.Ct.Pa. 2016) (considering the RRA and RRTA *in pari materia*). However, "[g]iven these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). That Congress expressly included pay for time lost in the RRA's definition of "compensation" yet omitted it from the RRTA's definition of "compensation" suggests that Congress did not intend the RRTA to include pay for time lost.

The history of the RRTA confirms that this difference is intentional. Prior to 1975, the RRTA's definition of "compensation" expressly included "pay for time lost," using language and structure identical to that of the RRA:

> (1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee

to one or more employers, or as an employee representative, ***including remuneration paid for time lost as an employee,*** but remuneration paid for time lost shall be deemed earned in the month in which such time is lost....

(2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. ***An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury,*** and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

26 U.S.C. § 3231(e)(1), (2) (1970) (emphasis added). In 1975, Congress amended the RRTA to remove the express inclusion of "pay for time lost" within the definition of "compensation" in § 3231(e)(1), but it retained the definition of "pay for time lost" in § 3231(e)(2). *Cowden*, 2014 WL 3096867, at *5-6. In 1983, Congress further amended section 3231(e) to "remove[ ] all language addressing payments for time lost and for personal injury." *Id.* at *6. Thus, "[i]t is beyond dispute that the plain language of the RRTA once provided for payments for time lost on account of personal injury, but no longer does." *Phillips*, 853 N.W.2d at 647.

While BNSF and the Government's argument that the RRTA should tax what the RRA uses to calculate benefits makes sense as a statutory scheme, this was expressly the statutory scheme that existed before the 1983 amendments. We are not convinced that we should import from the RRA the very language Congress eliminated from the RRTA. While "under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law," *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006) (quotation omitted), the relationship between the RRTA and the RRA does not require it, *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (explaining that RRTA "taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled" under the RRA). Therefore, we conclude that we should not read the RRTA and the RRA *in pari materia* and that it is inappropriate to import the RRA's definition of "compensation" into the RRTA.

Accordingly, we conclude that the RRTA is unambiguous and does not include damages for lost wages within the definition of "compensation." Therefore, the regulations providing to the contrary receive no deference under *Chevron*, because "the agency[ ] must give effect to the unambiguously expressed intent of Congress."[11] 467 U.S. at 842-43, 104 S.Ct. 2778. Because we affirm the district court's decision on this alternate basis, we need not consider whether it was correct that 26 U.S.C. § 104(a)(2) applies to the RRTA.

III. CONCLUSION

For the foregoing reasons, we affirm both the district court's decision to grant summary judgment to BNSF on Loos's FRSA claim and its denial of BNSF's request for an offset from the lost-wages award.

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11. We give no consideration to Revenue Ruling 85-97, 1985-2 C.B. 5, 1985-29 I.R.B. 5, 1985 WL 287177 (1985), or Revenue Ruling 61-1, 1961-1 C.B. 14, 1996 WL 12630 (Jan. 1961), because neither revenue ruling is directly on point, and neither takes account of the 1983 amendments.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FILED DECEMBER 15, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 13-cv-3373 (PAM/FLN)
2015 WL 8779813

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Signed December 15, 2015

MEMORANDUM AND ORDER

Paul A. Magnuson, United States District Judge

This matter is before the Court on Defendant BNSF Railway Company ("BNSF")'s Motion for Collateral Source Offsets. (Docket No. 130.) For the reasons that follow, BNSF's Motion is granted in part and denied in part.

Appendix B

Plaintiff Michael Loos brought a FELA claim against BNSF, which proceeded to trial in September 2015. On September 15, 2015, the jury returned its verdict, finding in favor of Plaintiff and awarding (1) $85,000 for past pain, disability, and emotional distress, (2) $30,000 for past wage losses, and (3) $11,212.78 in past medical expenses. (Docket No. 126.) BNSF now moves for offsets on the damages award of $15,078.51. This figure includes (1) negotiated discounts provided by Plaintiff's health insurer of $4,911.51, (2) satisfaction of a $6,402.00 Railroad Retirement Board lien for Plaintiff's short-term sickness and unemployment benefits, and (3) satisfaction of BNSF's obligation to withhold and pay the Internal Revenue Service ("IRS") $3,765.00 for Plaintiff's share of Railroad Retirement Tax Act payroll taxes on his wage loss award. The parties agree that BNSF will be required to pay the Railroad Retirement Board $6,402.00, and that this amount should be offset. The remaining dispute relates to medical expenses and railroad retirement taxes.

BNSF argues that under Minnesota's collateral source statute, Minn. Stat. § 548.251, Loos's medical expenses should be deducted from the jury's award. Loos contends that federal law controls all substantive matters in FELA cases, and the FELA provision addressing set-offs should be applied. That provision states:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,*

> That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55.

Loos is right. In FELA cases, issues must be determined by federal and not state law. *Dice v. Akron, C. & Y.R.R. Co.*, 342 U.S. 359, 361, 72 S. Ct. 312, 96 L. Ed. 398, 63 Ohio Law Abs. 161 (1952) ("[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."). BNSF cites *Adams v. Toyota Motor Corp.*, No. 10-2802, 2015 U.S. Dist. LEXIS 76903, 2015 WL 3742898, at *5 (D. Minn. June 15, 2015), to demonstrate that it is appropriate for federal courts to apply the state collateral source statute in a FELA case. But *Adams* was a design defect case based on diversity jurisdiction. Minnesota common law applied to the design-defect claim, so applying the state collateral source statute was warranted. Here, the FELA, a federal statute occupying the field of railroad employer liability for employee injuries and providing for set-offs, explicitly underlies Loos's claim in federal court. The FELA's set off provision, 45 U.S.C. § 55 applies.

BNSF asserts that Loos's health insurer, Medica, paid his medical expenses at a discounted rate, totaling $4,911.51 in discounts. The FELA's set-off provision states that a common carrier may set off amounts it paid or contributed to insurance that were paid to the injured employee. BNSF has not paid Loos's medical bills. Therefore, under the FELA, it is not entitled to a set-off. 45 U.S.C. § 55; *see also Clark v. Burlington N., Inc.*, 726 F.2d 448, 450 (8th Cir. 1984) ("Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums."). The damages award will not be set off by the amount of Loos's medical expenses.

BNSF also argues that railroad retirement taxes should be set off against the damages award. The Railroad Retirement Act (RRA), 45 U.S.C. § 231 et seq., provides railroad employees with social security-type benefits. *See Duckworth v. Allianz Life Ins. Co. of N. Am.*, 706 F.3d 1338, 1344 (11th Cir.2013) ("The provisions of the [RRA] are so closely analogous to those of the Social Security Act that regulations and cases interpreting the latter are applicable to the former."). The Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3201 et seq., is a subsection of the Internal Revenue Code that provides for taxing railroad employee compensation. 26 U.S.C. § 3201(a)-(b). This is executed through the use of a dual tax system "in which railroad employers must withhold their tax shares, as well as their employees' tax shares, and then provide both shares to the [IRS]." *Cowden v. BNSF Ry. Co.*, No. 4:08-cv-01534, 2014 U.S. Dist. LEXIS 91454, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014) (citing

26 U.S.C. § 3201(a)-(b)). Tier 1 taxes are imposed against railroad employees and employers, and are "analogous to taxes imposed on nonrailroad workers by the Federal Insurance Contributions Act (FICA)." 2014 U.S. Dist. LEXIS 91454, [WL] at *2. Tier 2 taxes are also imposed against both railroad employees and employers. Tier 2 benefits "are similar to those that workers would receive from a private multi-employer pension fund." *Id.* (citation omitted) (internal quotation marks omitted).

According to BNSF, because the statutes at issue treat time lost on account of personal injury as compensation, taxes must be collected on the $30,000 wage-loss portion of Loos's damages award. BNSF argues that $3,765.00 should therefore be set off against the damages award. This amount represents the amount of railroad retirement taxes that BNSF claims it must withhold from Loos's compensation to pay to the IRS. Loos contends that a FELA judgment is not taxable compensation, and that railroad retirement taxes should not be withheld from the damages award, citing *Cowden*, 2014 U.S. Dist. LEXIS 91454, 2014 WL 3096867 (noting that although damages award under the FELA may be compensation, it is not taxable income under the Tax Code's personal injury exclusion, 26 U.S.C. § 104(a)(2)).

This Court agrees with Judge Webber's analysis in *Cowden*. There, the court pointed out that the RRA and the RRTA define compensation differently, and that the more relevant inquiry is whether damages on a FELA judgment qualify as "compensation" subject to withholding under the RRTA. *Cowden*, 2014 U.S. Dist. LEXIS 91454,

[WL] at *5. Under the RRTA, FELA judgments for lost pay fall within the definition of "compensation." 2014 U.S. Dist. LEXIS 91454, [WL] at *9. However, the Tax Code excludes "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of physical injuries or physical sickness" from the definition of income. 26 U.S.C. § 104(a)(2). Further, "when an award is received for a personal injury in a tort or tort-type proceeding, the whole award is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for lost earnings." *Cowden*, 2014 U.S. Dist. LEXIS 91454, [WL] at *11 (citation omitted) (internal quotation marks omitted). "Having conducted an extensive examination of relevant statutes, regulations, and cases," the *Cowden* court "simply [could not] conclude Congress intended to tax personal injury judgments under the RRTA," 2014 U.S. Dist. LEXIS 91454, [WL] at *4, and neither can this Court.

Accordingly, **IT IS HEREBY ORDERED** that BNSF's Motion for Collateral Source Offsets (Docket No. 130) is **DENIED IN PART** and **GRANTED IN PART**. The damages award will be offset by $6,402.00 to satisfy the Railroad Retirement Board lien, but no offsets for medical expenses or railroad retirement taxes will be applied.

Dated: December 15, 2015

/s/
Paul A. Magnuson
United States District Court Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED OCTOBER 26, 2017

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-1123

MICHAEL D. LOOS,

Appellee,

v.

BNSF RAILWAY COMPANY,

Appellant.

United States of America
Amicus on Behalf of Appellant(s)
American Association for Justice
Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:13-cv-03373-PAM)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Appendix C

Judge Kelly did not participate in the consideration or decision of this matter.

October 26, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D — RELEVANT STATUTORY PROVISIONS

26 U.S.C.A. § 3231, I.R.C. § 3231

§ 3231. Definitions

Effective: December 19, 2014

Currentness

* * *

(e) Compensation.—For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee,

(ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically--either as an advance, as reimbursement or allowance--for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service"

for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases.--

(A) Compensation in excess of applicable base excluded.--

(i) In general.--The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded.--There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes.--Clause (i) shall not apply to--

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) **Applicable base.**--

(i) **Tier 1 taxes.**--Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) **Tier 2 taxes, etc.**--For purposes of--

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) **Successor employers.**--For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that--

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only--

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph

(A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

(7) Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(13)(B)(v), Dec. 19, 2014, 128 Stat. 4040]

(8) Treatment of certain deferred compensation and salary reduction arrangements.--

(A) Certain employer contributions treated as compensation.--Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation.--The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging.--The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions.--The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions.--The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such

payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options.--The term "compensation" shall not include any remuneration on account of--

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

* * *

(h) Tips constituting compensation, time deemed paid.--For purposes of this chapter, tips which constitute compensation for purposes of the taxes imposed by section 3201 shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

* * *

Appendix D

45 U.S.C.A. § 231

§ 231. Definitions

Currentness

For the purposes of this subchapter—

* * *

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231h of this title, the period during which such compensation will have been earned.

(2) An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

(3) Solely for purposes of determining amounts to be included in the compensation of an employee, the term "compensation" shall also include cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4) Tips included as compensation by reason of the provisions of subdivision (3) shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6053(a)] or, if no statement including such tips is so furnished, at the time received. Tips so deemed to be paid in any month shall be deemed paid for services rendered in such month.

(5) In determining compensation, there shall be attributable as compensation paid to an employee in

calendar months in which he is in military service creditable under section 231(b)(i)(2) of this title, in addition to any other compensation paid to him with respect to such months--

(i) for each such calendar month prior to 1968, $160;

(ii) for each such calendar month after 1967 and prior to 1975, $260; and

(iii) for each such calendar month after 1974, the amount which is creditable as such individual's "wages" under section 209(d) of the Social Security Act [42 U.S.C.A. § 409(d)].

(6) Notwithstanding the provisions of the preceding subdivisions of this subsection, the term "compensation" shall not include--

(i) tips, except as is provided under subdivision (3) of this subsection;

(ii) remuneration for service which is performed by a non-resident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 1101(a)(15) of Title 8, as amended, and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be;

(iii) remuneration earned in the service of a local lodge or division of a railway-labor-organization employer

with respect to any calendar month in which the amount of such remuneration is less than $25;

(iv) remuneration for service as a delegate to a national or international convention of a railway-labor-organization employer if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service";

(v) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability; and

(vi) an amount paid specifically--either as an advance, as reimbursement or allowance--for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment.

(7) The term "compensation" includes any separation allowance or subsistence allowance paid under any benefit schedule provided under section 701 of Title VII of the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 797] and any termination allowance paid under section 702 of that Act [45 U.S.C.A. § 797a], but does not include any other benefits payable under that title [45 U.S.C.A. § 797 et seq.]. The total amount of any subsistence allowance paid under a benefit schedule provided pursuant to section 701 of the Regional Rail Reorganization Act of 1973 shall be considered as having been earned in the month in which the employee first timely filed a claim for such an allowance.

(8) Notwithstanding any other provision of this subchapter, for the purposes of sections 231b(a)(1), 231c(a)(1), and 231c(f)(1) of this title, the term "compensation" includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 of the Internal Revenue Code of 1954 [26 U.S.C.A. §§ 3201, 3211].

* * *

Appendix D

26 C.F.R. § 31.3231(e)–1, Treas. Reg. § 31.3231(e)–1

§ 31.3231(e)–1 Compensation.

Currentness

<For statute(s) affecting validity,
see: 26 USCA § 3231(e)(1), (2).>

(a) Definition—(1) The term compensation has the same meaning as the term wages in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123–1.

(3) The term compensation is not confined to amounts

paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)–3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)–1T.

(6) **Split-dollar life insurance arrangements.** See §§ 1.61–22 and 1.7872–15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(b) Special Rules. (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)–1.